

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001S005

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TINA BOWMAN,

Complainant,

vs.

DEPARTMENT OF REVENUE,

Respondent.

Administrative Law Judge Robert W. Thompson, Jr. heard this matter on July 22 and 24 and September 23 and 24, 2002. Joseph Q. Lynch, Assistant Attorney General, represented respondent. Complainant appeared in-person and was represented by attorney Anita L. Espinosa.

MATTER APPEALED

Complainant appeals her nonselection for a promotional position. For the reasons set forth below, the personnel action is affirmed.

ISSUES

1. Whether complainant was discriminated against on the basis of national origin when she was not selected to fill a promotional vacancy;
2. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses, and makes the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant Tina Bowman was born and raised in Manila, Philippines. She refers to herself as "Filipina." She is a naturalized United States citizen.
2. Bowman has been employed by respondent Department of Revenue (DOR) since October 1, 1984, when she was hired as a Tax Examiner. She became a Revenue Agent (RA) I in August 1985.
3. Bowman attended the University of Denver Law School, evening division, and earned a J.D. degree in August 1990.
4. In October 1990, Bowman was appointed to be an Out-of-State agent stationed in Chicago to audit companies there that do business in Colorado. She spent 20 months in Chicago.
5. Bowman resigned from DOR in May 1992 and was rehired in August 1993.
6. Bowman became an RA III in May 1997. Revenue Agent III is a senior level position.
7. In 1997, Phil Spencer was promoted from RA IV to the position of Chief Auditor for the Field Audit Section. Bowman took over his responsibilities in the area of tax policy and research from 1997 to 2000. During this period, some of Bowman's co-workers perceived that she was receiving preferential treatment by getting special assignments, such as legal research, based on having a law degree, and by having her own office, which was atypical for RA IIIs.

8. In August 2000, Bowman applied for the position of RA IV. RA IV is a management level position. This was a promotional vacancy created by a retirement.
9. The promotional announcement described the class of RA IV jobs as follows: "Positions in this class are responsible for supervising a group of subordinate Revenue Agents or a specific program area within the Tax Audit and Compliance Division."
10. The announced requirements for this RA IV position were, "Five years of experience as a Revenue Agent III or as an Out-of-State Revenue Agent." There were no substitutions for the experience.
11. This RA IV position was one of eight that involved the supervision of six to nine field auditors. Three of the eleven RA IV positions involved special assignments and not supervision of other auditors.
12. Bowman possessed three years and two months experience as an RA III and one year and eight months as an Out-of-State Agent, leaving her two months shy of the five-year experience requirement. She was allowed to take the promotional exam pursuant to a personnel rule that provides that employees may participate in the examination process if they are within 90 days of the experience requirement but cannot be referred for an interview until they are fully qualified.
13. The DOR human resources office conducted an examination and developed an eligibility list of qualified candidates. Of the eight applicants, four were referred for an interview following the testing process, there being a tie for third on the eligibility list.

14. Normally only three applicants are referred to the appointing authority for an interview. Appointing authorities have the discretion to select any one of the top three finalists. The candidates are referred to them in alphabetical order. They are not told of the individual scores or rankings, the purpose of which is to establish an eligibility list, not to determine the best qualified.
15. The four candidates were John Bailey (Caucasian male), Bowman, Michael Santos (Hispanic male), and Karen Shaw (Caucasian female).
16. Chief Auditor Phil Spencer, who was delegated the appointing authority to make personnel decisions for the Field Audit Section, interviewed all four candidates in November 2000. He did not know their individual rankings on the test, except that on her interview Bowman emphasized that she was #1.
17. Bowman was under the mistaken impression that Spencer automatically chose the applicant who was first on the eligibility list, believing that it was agency practice to always appoint the first-ranked candidate.
18. In May 1997, Spencer offered Joyce Chevarria a promotion to RA IV based upon having more experience and a better reputation for getting along with others than the other applicants, even though she had placed third on the eligibility list. She declined the offer because the job was primarily in-house and clerical, and she was looking to supervise a group of field auditors. The job then went to another Caucasian female, who had placed first on the test.
19. In March 1998, Chevarria placed second on the RA IV promotional exam and was offered the job by Spencer on the basis of having more

experience than the other two candidates. The candidate who had placed first was also Caucasian female.

20. On November 28, 2000, Virginia Ruge, an RA III in the Field Audit Section, sent an e-mail message to John Vecchiarelli and to Phil Spencer in which she suggested that this would be an opportune time to promote a minority applicant into a supervisory position, since two of the four candidates for the vacant RA IV position were members of a minority group. She noted that none of the ten current RA IVs was an ethnic minority, albeit that there were two retired RA IVs who were minorities (black and Hispanic, respectively). Vecchiarelli and Spencer each sent a reply e-mail expressing agreement with the concept of diversity but noting that promotions within the department were based upon merit alone.
21. Vecchiarelli, who, as Senior Director of Taxation, is responsible for the administration of all taxes and was Phil Spencer's direct supervisor, met with Spencer on November 30 and advised him to be sensitive to the issue of diversity but also to hire only on the basis of merit.
22. Spencer selected Karen Shaw as the best-qualified applicant to fill the RA IV vacancy. Shaw had tied for third with Michael Santos on the promotional exam, information that Spencer did not know. Spencer selected Shaw on the basis of the objective factors of being an RA III for a longer period of time (five years, two months) than Bowman and having more actual auditing experience, evinced by Shaw's application. He also took into account Shaw's auditing experience in the private sector, which included some supervision. He factored in the particular group of auditors that she would supervise, which included both experienced and inexperienced auditors, and favored Shaw's strong auditing skills and good people skills.

DISCUSSION

I.

This case is controlled by *Bodaghi v. Department of Natural Resources*, 995 P.2d 288 (Colo. 2000) (involving claims of unlawful employment discrimination in the context of a state agency's promotion practices). The ultimate question is, "whether, in light of all the evidence in the record, the employee [complainant] has proved that the employer [respondent] intentionally and unlawfully discriminated against the employee." *Id.* at 298.

In order to prove a *prima facie* case of intentional discrimination under Colorado law, complainant must demonstrate by preponderant evidence that (1) she belongs to a protected class, that (2) she was qualified for the position at issue, that (3) she suffered an adverse employment decision, and that (4) all the evidence in the record supports or permits an inference of unlawful discrimination. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 400 (Colo. 1997), citing *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

If the employee establishes a *prima facie* case, a presumption that the employer unlawfully discriminated against the employee is created. The employer may successfully rebut this presumption by setting forth a legitimate, non-discriminatory reason for the action taken. The burden of production of evidence is thus shifted to the employer, but the employee continues to carry the ultimate burden of showing intentional discrimination. *Big O Tires*, 940 P.2d at 399. If the agency offers a nondiscriminatory reason for its decision, then the employee has an opportunity to demonstrate that the presumptively valid reason asserted was a pretext for discrimination. The employee does not necessarily have to present evidence in addition to the evidence establishing her *prima facie* case in order to infer the ultimate fact of intentional discrimination. *Bodaghi*, 995 P.2d at 292.

II.

Here, in view of all the evidence in the record, the complainant did not present sufficient evidence to support or permit an inference of intentional discrimination. The test scores and rankings on the eligibility list are not evidence of the most qualified applicant. The purpose of the eligibility list is to determine the top three candidates, all qualified by the examination process, who are referred to the appointing authority for a personal interview. Any one of the three may be selected by the appointing authority to fill the position. See C.R.S. § 24-50-112.5 (Selection system).

Unlike the complainant in *Bodaghi, supra*, where discrimination was found, the present complainant was not objectively more qualified than the successful applicant. She did not produce sufficient evidence to show that she was not selected because of her status as an ethnic minority. According to *Bodaghi*, it would have been improper to consider her law degree when the position did not require such. If the evidence had sustained her assertion that this was the first time the top-ranking applicant was not selected, the outcome might be different. The fact that there were no ethnic minorities among the group of ten Revenue Agent IVs may be eye-catching, but without more, it is insufficient as evidence to infer intentional discrimination in this instance. There was no direct or indirect evidence, only bare allegations, that the hiring decision was made on the basis of complainant's ethnic background, again unlike *Bodaghi*.

When the elements of a *prima facie* case of discrimination are not met, the analysis ends. Nonetheless, respondent's asserted business reason for its decision in this instance, that another candidate was better qualified, will be discussed.

In making the final selection, this appointing authority took into account what are arguably subjective factors, such as "good people skills" and how he anticipated that the particular group of auditors would interact with their new supervisor. The

use of subjective factors to make a hiring decision may be evidence of pretext when the minority applicant is objectively better qualified than the non-minority chosen. *Bodaghi*, 995 P.2d at 300. In this case, however, the subjective factors were considered *in addition to* the primary objective factor of more auditing experience. As noted earlier, this is not a case of an objectively less qualified applicant being chosen over a more qualified minority applicant. Additionally, there was no showing that the selection procedure was irregular, as it was in *Bodaghi*. Consequently, even if complainant had established a *prima facie* case of intentional discrimination, she did not rebut respondent's asserted non-discriminatory reason for its decision by showing pretext.

III.

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record does not support any of those findings. Accordingly, this is not a proper case for a fee award. See Rule R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

1. Complainant was not discriminated against on the basis of national origin.
2. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's personnel action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day
of October, 2002, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of October, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Anita L. Espinosa
Attorney at Law
4881 South Ceylon Street
Aurora, CO 80015

And through the interagency mail to:

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